FOO LAN FOOW & ANOR

v.

KAMISAH ABDUL HANIS

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL APPEAL NO: 12-237-2001]
23 APRIL 2004

ROAD TRAFFIC: *Negligence - Fatal accident - Pillion rider dead as a result of collision between motorcycle on which he was a pillion rider and a motorcar - Sessions court judge dismissed claim for damages by widow of deceased - Whether sessions court judge failed to consider discrepancy in 1st defendant's evidence - Whether 1st defendant's witnesses credible - Apportionment of liability*

EVIDENCE: *Witness - Credibility - Finding of sessions court judge that 1st defendant's witnesses credible - Whether there were material contradictions in evidence of both witnesses - Whether sessions court judge had erred*

DAMAGES: *Fatal accident - Dependency claim - Deceased killed in road accident - Claim by widow for loss of dependency and bereavement - Quantum*

The plaintiff was the widow of the pillion rider who had died in a motor accident that occurred between the motorcycle that he was riding upon and a motorcar. The learned sessions court judge found as a fact that the said accident had occurred at the junction of two roads, Jalan Anson and Jalan Nirvana. She had also accepted the defendant's ('DW1') contention that it was a rear collision and found DW1's witnesses, DW2 and DW3, to be credible witnesses "by virtue of their consistency with regard to material particulars pertaining to the accident". She disbelieved the motorcyclist's evidence when he said that the collision occurred at the right side of the car as the damages appeared to be at the rear of the car. The learned judge, therefore, dismissed the plaintiff's claim without even assessing damages resulting in this appeal by the plaintiff.

Held (allowing the appeal):

[1] Firstly, DW1 said in evidence-in-chief that as she neared the junction leading to Jalan Nirvana, she gave her right signal, looked at the rear-view mirror, saw no vehicle and turned to the right. She was then 50 feet from the junction when the motorcyclist suddenly collided into her. The learned judge, however, found as a fact that the collision occurred at the

junction, and not 50 feet away. This discrepancy in DW1's evidence was neither explained by DW1 nor considered by the learned judge. This evidence certainly tallied with the evidence of the motorcyclist who said that the driver of the car suddenly swerved into his path, although he maintained that this had occurred at, or near, the junction. The failure of the learned judge to consider this vital discrepancy was reason enough for this court to interfere. (p 239 d-f)

[2] Secondly, the learned judge found DW2 and DW3 to be credible witnesses even though DW2's evidence of events before the accident was inherently incredible and illogical, and his version of events after the accident differed materially from that of DW3. The learned judge failed to consider and give due weight to the material contradictions in the evidence of both DW2 and DW3 respectively. With all these nagging doubts, the learned judge was wrong to have found DW2 and DW3 to be credible witnesses. (pp 239 g-h, 240 a-h & 241 a)

[3] From the evidence adduced, this court found DW1 to be negligent to the extent of 50%, with the rider of the motorcycle on which the deceased rode as a pillion, being liable 50% himself. However, since the plaintiff was the widow of the pillion rider, she ought to succeed on a 100% basis since no third party proceedings were taken out against the rider of the motorcycle nor did DW1 apply to join the said rider as a co-defendant. (p 241 b-c)

[The plaintiff to be awarded RM64,000 for loss of dependency and RM10,000 for bereavement with 4% interest from date of accident to date of judgment.]

Case(s) referred to:

Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah, Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC

Multar Masngud v. Lim Kim Chet & Anor [1982] CLJ 107; [1982] CLJ (Rep) 237 FC

Uval & Anor v. Zainal [1970] 1 MLJ 74

Other source(s) referred to:

Nathan on Negligence, 1998 edn, p 376

For the plaintiff - CK Dasaratharaj Pillai; M/s VP Nathan & Partners
For the 1st defendant - Ponnusamy Pillai; M/s Haniff & Chew

Reported by Suresh Nathan

JUDGMENT

The Facts

This is a straight forward running down case. The plaintiff is the widow of the pillion rider who died in the said motor accident. On 7 July 1997 at about 7.30pm the rider of the motorcycle PDH 9698 with the deceased as a pillion was riding along Jalan Anson which was a one way road from the direction of Jalan Macalister towards the direction of Jalan Perak.

The rider testified that as he was proceeding about 3-4 feet from the left edge of the road from the direction of north to south a motor car No. PDH 9698 which was ahead of him suddenly and without warning cut across his path from the left to the right with the intention of entering into Jalan Nirvana. The said motor car did not give any signal before cutting across his path. Because he braked and swerved to the left he was able to avoid colliding into the off side of the said car. However he collided into the rear offside of the said car. He denied the defence's suggestion that the said car was indeed on the right lane and had indicated with a signal its intention to turn right.

The 1st defendant (DW1) who was the driver of the said motorcar lodged a police report in which she said that as she neared the junction leading to Jalan Nirwana she gave her signal with the intention of turning right when suddenly she was collided into by the motorcycle coming from her rear.

In her evidence-in-chief she gave this same evidence except that at the same time she had also looked through her rear-view mirror and on seeing no vehicles coming from the rear she turned right when she was suddenly collided into from the rear by the motorcycle. She was then about 5 feet from the right edge of the road and about 50 feet from the junction she was turning into. She denied the rider's version of the accident. Her speed all along had been 10-15 mph.

The 1st defendant called DW2 as her next witness. DW2 testified that he had been following the 1st defendant's car for five minutes before the accident occurred. His speed then was between 25-30 mph and he was riding 4-5 feet from the left edge of the road. Then he says that the first time he saw the defendant's car he was 60 feet away and the car was on the right lane. Suddenly a motorcycle overtook him on his right at such speed and so close to him that he almost lost control of his motorcycle. He saw this motorcycle again cutting to its right and colliding into the defendant's car. The motorcyclist had swerved either because he had no time to brake or that he was trying to overtake the car. He could not tell if DW1 had the indicator on.

The 1st defendant then call DW3 the daughter of DW2, a young girl of seventeen, who testified that she was riding pillion on her father's motorcycle when it was overtaken by the deceased's motorcycle which then collided into the defendant's motorcar which at that moment was stationary and at a diagonal position. Under cross-examination she admitted that the defendant was her father's friend.

Finding Of This Court

In this case the learned Sessions Judge had reproduced the same judgment twice. On 8 June 2000 when parties appeared before her she read out her judgment in which she found as a fact that the said accident had occurred at the junction of Jalan Anson/Jalan Nirvana. She also accepted the defendant driver's version that it was a rear collision as correct, and found DW2 and DW3 as credible witnesses. She found them credible "by virtue of their consistency with regard to material particulars pertaining to the accident". She disbelieved the motorcyclist's evidence when he said that the collision was at the right rear of the car. The learned Sessions Judge was of the view that if the rider's version was to be accepted the collision ought to have been on the right side of the body of the car and not at the rear as the damages appeared to be. She therefore dismissed the claim without even assessing damages.

Subsequently when an appeal was filed she reproduced her earlier judgment verbatim but dated it as 1 June 2001. Fortunately she had merely reproduced word for word her earlier judgment. Otherwise I would have been compelled to reject the second judgment since she was already *functus officio* when she read out her written judgment on 8 June 2000. As it is, I shall be referring only to her judgment dated 8 June 2000.

It is trite law that an appellate court will not interfere with the findings of a trial judge more so when the latter had had the benefit of seeing and hearing the witnesses and assessing their ability to tell the truth. (See *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77, SC). The court will also not interfere with the apportionment of blame as long as there was no error of law or of fact in the judgment of the lower court (see *Uval and Anor v. Zainal* [1970] 1 MLJ 74).

However the appellate court will interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty of one party's evidence and the consistency of the other party's evidence being disregarded (see *Multar Masngud v. Lim Kim Chet & Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237; [1982] 1 MLJ 184, FC). I reiterate what I had said in my book *'Nathan on Negligence'* 1998 edn at p. 376. It reads as follows:

> The circumstances in which it is open to an appellate court to reverse the findings of a trial judge based on credibility of the witnesses who have given evidence at the trial are limited. But when a trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and in reaching his conclusion has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of the appellate court to intervene and correct the error lest otherwise the error result in serious injustice. An appellate court will interfere with the findings of a trial judge, even if he had found that the claimant's evidence was consistently given throughout the various stages of the examinations before the court and the defendant's evidence was not consistent and was full of contradictions so long as the appellate court determines that the claimant's story was inherently improbable.

Having set the law I now look at the facts which the trial judge had failed to consider.

Firstly the 1st defendant driver said in evidence-in-chief that as she neared the junction leading to Jalan Nirvana, she gave her right signal, looked at the rear-view mirror, saw no vehicle, and turned to the right. She was then 50 feet from the junction. She was then suddenly collided into by this motorcyclist. However the learned judge found as a fact and as conceded to by the parties, that the collision occurred at the junction, not 50 feet away. This discrepancy in DW1's evidence was neither explained by DW1 nor considered by the learned judge.

To my mind this evidence certainly tallies with the evidence of the motorcyclist who said that the driver of the car suddenly swerved into his path, although he maintained, and correctly so, that this swerving occurred at or near the junction. It is my judgment that the failure of the Sessions Judge to consider this vital discrepancy is reason enough for this court to interfere.

Secondly the Sessions Judge found DW2 and DW3 as credible witnesses. It is therefore necessary to analyse the evidence of those two so called credible witnesses. Firstly DW2 said he was following DW1 for five minutes. Yet the first time he saw the said car was when he was only 60 feet from the said car. Even though DW1 said that her speed all along was between 10-15 mph and he had said that his speed was 25-30 mph, it would have been impossible for him to have been following DW1's car for five minutes and yet see it for the first time, only 60 feet away. This is an inherently incredible story. Secondly if he had been following the said car for five minutes (assuming this is true) then since his speed was faster than the snail's speed of DW1, surely he would have gone well past DW1 even before DW1 had arrived at the fateful junction. Thirdly, he was on the left lane and the rider of the motorcycle rode so close to him that he almost lost his balance. The key and sketch show A - A1, which

is one half of the one way road as being 7.60 meters (about 27 feet) wide. The left half of the road on which both DW2 and the rider were proceeding on was A1-A2 whose width as shown on the key and sketch was 6.90 meters (about 24 feet). According to this witness at this time he was 4-5 feet from the left edge of his road. Even assuming the plaintiff's rider was just 1 foot from him, the plaintiff's rider had 24 - (5+1) = 18 feet of space on his own half of the road. Now, as shown earlier, the other half of the road on which DW1's car was, was 27 feet wide. The question is why would the plaintiff's rider who had 18 feet on his road and a further 27 feet on the other side of the road, swerve into DW1's path and collide into the car. It does not stand to logic. Since DW1's car was already at the junction, the plaintiff's rider could have easily passed DW1's car even from within his own 18 feet space. According to DW2, the plaintiff's rider swerved either because he had no time to brake or that he was going to overtake the car. But this cannot be so since the said rider had 18 feet of empty space to manoeuvre his motorcycle, unless he wanted to commit suicide. And yet the Sessions Court Judge found this witness's testimony credible.

As for DW3 she testified that after she saw the accident her father made a turn and stopped at the BP Station to see what was happening. There her father had told her that DW1 was the boss of the Caltex Station along that road. Neither she nor her father went to the scene to render assistance. Only then her father took her to the tuition centre. Further whilst riding pillion she was able to exactly tally with her father's evidence that his speed was 20 - 25 kph and that they were riding 4-5 feet from their left edge of the road.

However DW2 her father testified that as soon as the accident had occurred he proceeded on his journey to leave his daughter at the tuition centre since he saw a lot of people running to render assistance and besides, he was running late to send his daughter to the tuition centre. After sending her to the tuition centre he had to return the same way and he saw DW1 standing by herself at the scene. This evidence clearly contradicts the daughter's evidence that her father had stopped with her at the BP Station to see what was happening. If she could remember all the details relating to the accident, how is it that on this one issue she diferred materially from the evidence given by her father.

Whilst I agree this contradiction does not relate to matters prior to, or at the time of the accident, yet this serious contradiction ought to have been considered by the learned Sessions Judge. If after considering this she had ruled that this was not a serious contradiction to have affected her credibility, this court would not have commented on this issue. However since the Lower Court had failed to consider and give due weight to this material contradiction, I do not think the learned Sessions Judge was right in holding her as a credible witness.

Further, she was seventeen years old and was seated as pillion and yet she was able to say that the speed of the motorcycle was 20 - 25 mph. She did not even lead evidence that she could ride a motorcycle to be in a position to self-assess the speed of the motorcycle ridden by her father. With all these nagging doubts, it was wrong of the learned Sessions Judge to have found DW2 and DW3 as credible witnesses.

In the circumstances I allowed the appeal and set aside the judgment of the Lower Court dismissing the plaintiff's claim. I found the defendants negligent to the extent of 50%, with the rider of the motorcycle in which the deceased rode as a pillion, being liable 50% himself from the evidence adduced. However since the plaintiff in the case before me was the widow of the pillion I ruled that she ought to succeed on 100% basis since no third party proceedings were taken out against the rider of the motorcycle in which the deceased was riding pillion, nor did the defendants apply to join the said rider as a co-defendant.

Although the defendants had initially appealed even against quantum although the said sum was not even assessed by the Lower Court, and there was therefore no basis for such an appeal, the parties had, prior to this appeal before me, agreed to the sum of RM64,000 as loss of dependency and RM10,000 as a claim for bereavement with the usual interest at 4% on both awards from date of accident to date of judgment. I therefore made such an order and awarded the plaintiff the costs both here and below.